



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 12, 1997

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Jan Witold Baran, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

RE: MUR 4434
Joseph Kadow

Dear Mr. Baran:

On August 13, 1996, the Federal Election Commission notified your client, Joseph Kadow, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to Mr. Kadow at that time.

Upon further review of the allegations contained in the complaint, and information provided by your client, the Commission, on September 9, 1997, found that there is reason to believe Joseph Kadow violated 2 U.S.C. § 441b(a), a provision of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath. All responses to the enclosed Subpoena to Produce Documents and Order to Submit Written Answers must be submitted to the General Counsel's Office within 30 days of your receipt of this letter. Any additional materials or statements you wish to submit should accompany the response to the subpoena and order. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Tony Buckley, the attorney assigned to this matter, at (202) 219-3690.

Sincerely,

A handwritten signature in black ink, appearing to read "John Warren McGarry". The signature is stylized with a large, sweeping "J" and "M".

John Warren McGarry
Chairman

Enclosures
Subpoena and Order
Factual and Legal Analysis

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

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MUR 4434

SUBPOENA TO PRODUCE DOCUMENTS
ORDER TO SUBMIT WRITTEN ANSWERS

TO: Joseph Kadow
c/o Jan Witold Baran, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Pursuant to 2 U.S.C. § 437d(a)(1) and (3), and in furtherance of its investigation in the above-captioned matter, the Federal Election Commission hereby orders you to submit written answers to the questions attached to this Order and subpoenas you to produce the documents requested on the attachment to this Subpoena. Legible copies which, where applicable, show both sides of the documents may be substituted for originals.


Such answers must be submitted under oath and must be forwarded to the Office of the General Counsel, Federal Election Commission, 999 E Street, N.W., Washington, D.C. 20463, along with the requested documents within 30 days of receipt of this Order and Subpoena.

WHEREFORE, the Chairman of the Federal Election Commission has hereunto set his
hand in Washington, D.C. on this 12th day of September, 1997.

For the Commission,


John Warren McGarry
Chairman

ATTEST:


Marjorie W. Emmons
Secretary to the Commission

Attachments
Instructions
Definitions
Questions and Production of Documents

INSTRUCTIONS

In answering these interrogatories and request for production of documents, furnish all documents and other information, however obtained, including hearsay, that is in possession of, known by or otherwise available to you, including documents and information appearing in your records.

Each answer is to be given separately and independently, and unless specifically stated in the particular discovery request, no answer shall be given solely by reference either to another answer or to an exhibit attached to your response.

The response to each interrogatory propounded herein shall set forth separately the identification of each person capable of furnishing testimony concerning the response given, denoting separately those individuals who provided informational, documentary or other input, and those who assisted in drafting the interrogatory response.

If you cannot answer the following interrogatories in full after exercising due diligence to secure the full information to do so, answer to the extent possible and indicate your inability to answer the remainder, stating whatever information or knowledge you have concerning the unanswered portion and detailing what you did in attempting to secure the unknown information.

Should you claim a privilege with respect to any documents, communications, or other items about which information is requested by any of the following interrogatories and requests for production of documents, describe such items in sufficient detail to provide justification for the claim. Each claim of privilege must specify in detail all the grounds on which it rests.

Unless otherwise indicated, the discovery request shall refer to the time period from January 1, 1994 to the present.

The following interrogatories and requests for production of documents are continuing in nature so as to require you to file supplementary responses or amendments during the course of this investigation if you obtain further or different information prior to or during the pendency of this matter. Include in any supplemental answers the date upon which and the manner in which such further or different information came to your attention.

DEFINITIONS

For the purpose of these discovery requests, including the instructions thereto, the terms listed below are defined as follows:

"You" shall mean the named respondent in this action to whom these discovery requests are addressed, including all employees, agents or attorneys thereof.

"Outback" shall mean Outback Steakhouse of Florida, Inc. and all predecessor and successor corporations.

"Persons" shall be deemed to include both singular and plural, and shall mean any natural person, partnership, committee, association, corporation, or any other type of organization or entity.

"Document" shall mean the original and all non-identical copies, including drafts, of all papers and records of every type in your possession, custody, or control, or known by you to exist. The term document includes, but is not limited to books, letters, contracts, notes, diaries, log sheets, records of telephone communications, transcripts, vouchers, accounting statements, ledgers, checks, money orders or other commercial paper, telegrams, telexes, pamphlets, circulars, leaflets, reports, memoranda, correspondence, surveys, tabulations, audio and video recordings, drawings, photographs, graphs, charts, diagrams, lists, computer print-outs, and all other writings and other data compilations from which information can be obtained. For all types of documentary records requested, if any of these records are maintained on any storage format for computerized information (e.g., hard drive, floppy disk, CD-ROM), provide copies of the records as maintained on that storage format in addition to hard (i.e., paper) copies.

"Identify" with respect to a document shall mean state the nature or type of document (e.g., letter, memorandum), the date, if any, appearing thereon, the date on which the document was prepared, the title of the document, the general subject matter of the document, the location of the document, the number of pages comprising the document.

"Identify" with respect to a person shall mean state the full name, the most recent business and residence addresses and the telephone numbers, the present occupation or position of such person, the nature of the connection or association that person has to any party in this proceeding. If the person to be identified is not a natural person, provide the legal and trade names, the address and telephone number, and the full names of both the chief executive officer and the agent designated to receive service of process for such person.

"And" as well as "or" shall be construed disjunctively or conjunctively as necessary to bring within the scope of these interrogatories and request for the production of documents any documents and materials which may otherwise be construed to be out of their scope.

QUESTIONS AND PRODUCTION OF DOCUMENTS

1. Identify each person from whom you solicited a contribution for Mark Sharpe for Congress. Include in your identification the method used in soliciting each person, whether by telephone call, written document, in person, or any other method. Produce all documents which relate in any way to your solicitation of contributions to be made to Mark Sharpe for Congress.
2. For the period January 1, 1994 through November 8, 1994, describe each trip taken by you outside of a 100-mile radius of Outback's headquarters at 550 N. Reo Street in Tampa, Florida. For each trip, include your destinations, the length of your stays, the costs of your trip (including transportation and accommodations), and the purposes for your trip. Identify the persons who paid the costs for each trip. Identify each person from whom you received a contribution for Mark Sharpe for Congress while on each trip. Identify each person who traveled with you on each trip. Produce all documents which relate in anyway to the trips described in response to this question.
3. Describe each meeting at which you, Mark Sharpe or any other representative of Mark Sharpe for Congress, and any other Outback officer were present. Include in your description: 1) the date of the meeting; 2) the location of the meeting; and 3) the topics of discussion of the meeting. Identify all persons who attended each meeting. Produce all documents prepared by you for use at each meeting and all notes taken by you at each meeting. Produce any other document which relates to any such meeting.
4. If not otherwise produced in response to another question, produce in its entirety the document entitled "Sharpe for Congress Campaign Plan 1994," two pages of which served as Exhibit B to your response to the complaint in this matter.
5. Identify all documents consulted in responding to this Subpoena and Order. Identify all individuals, not otherwise identified in response to any of the above questions, who have knowledge or information related to the answers to the above questions.

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Joseph Kadow

MUR: 4434

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission by Nick Baldick of the Florida Democratic Party. See 2 U.S.C. § 437g(a)(1). The complaint was based on a newspaper report appearing in the June 30, 1996 issue of the *Tampa Tribune*.

II. FACTUAL AND LEGAL ANALYSIS

A. The Complaint

The complaint suggests that several violations of the Federal Election Campaign Act of 1971, as amended ("the Act"), occurred involving Outback Steakhouse of Florida, Inc. ("Outback") and its officer, Joseph Kadow, and Mark Sharpe for Congress, the principal campaign committee of Mark Sharpe in the 1994 race for the House seat from Florida's 11th Congressional district ("the Sharpe campaign"). Specifically, the complaint alleges that Joseph Kadow acted as a conduit or intermediary who exercised "direction or control" over contributions to Mark Sharpe for Congress. As a result, according to the complaint, Kadow exceeded several contribution limits and may have failed to file appropriate reports of conduit contributions.

B. Response to the Complaint

A joint response was received from Outback and Mr. Kadow addressing all of the allegations made against them.

According to the response, Joseph Kadow has been Vice President and General Counsel of Outback since April 1994. Among his duties, Mr. Kadow supervises the Outback Political Action Committee ("Outback PAC").

According to the response, Mark Sharpe asked Kadow to serve on his campaign's finance committee in June 1994, and Kadow eventually became one of Sharpe's two principal campaign advisors. Kadow states that all of his activities on behalf of the Sharpe campaign were undertaken in his personal (as opposed to corporate) capacity, and performed on his own time.

The response asserts that Kadow's use of corporate resources "in support of his volunteer activity" was minimal, and that he only spent 20-25 hours on campaign-related activity at the office in the four months leading up to the election. The response admits that Kadow's secretary spent approximately 23 hours on campaign related activities and, sometime in 1996, Kadow reimbursed Outback approximately \$450 for her services and for the cost of his telephone calls.

According to the response, Kadow organized a September 17, 1994 fundraising dinner for Sharpe at the home of Outback's current Chief Operating Officer, Robert Basham. Outback PAC "arranged and paid most of the costs of the fundraiser," which were reported as in-kind contributions to the campaign. Basham was "a friend of Mr. Sharpe before the 1994 campaign, and an early supporter of the Sharpe campaign." The invitation list to the fundraiser consisted of past contributors to the state and local Republican Party and personal contacts of campaign officials and organizers of the fundraiser. Of the 100 people attending the fundraiser, 15 were Outback officials, JVP owners, franchisees, and major investors in Outback. Eleven spouses of these individuals attended. Congressman Newt Gingrich was transported to the event via an

Outback corporate jet, for which the Sharpe campaign had previously reimbursed Outback \$331, on September 14, 1994.

In the weeks leading up to the election, Kadow, allegedly in his personal capacity, solicited additional individuals on behalf of Mr. Sharpe. The persons solicited included persons described as Kadow's "acquaintances," including Outback executives, franchisees and JVP owners, and "others within the food service industry and the Tampa community. According to the response, some checks were sent to Mr. Kadow at his home or office, and some were sent directly to the Sharpe campaign. Checks sent to Kadow were delivered by him to the campaign after working hours.

Regarding the substance of the allegations, the response argues that Mr. Kadow is exempt from the definition of a "conduit" because he was acting as an agent of the campaign pursuant to the requirements of 11 C.F.R. § 110.6(b)(2)(i)(E). Alternatively, the response argues that, even if Mr. Kadow was a conduit or intermediary, he did not exercise any direction or control over the choice of the recipient candidate.

The response also addresses any possible contribution through use of corporate resources in support of Mr. Sharpe. It states that Kadow "made only 'occasional, isolated or incidental use' of Outback" corporate resources, and that his efforts "in no way interfered with his duties for Outback." The response further states that Kadow made a belated but full reimbursement to Outback for the costs of telephone calls made to solicit contributions. With regard to the efforts of Kadow's secretary, Kadow states that she considered herself to be a volunteer for the campaign.

The response further states that the Commission's regulations regarding "facilitation" do not apply to Kadow's receipt of contributions at the office and his delivery of them to Mark Sharpe for Congress. Respondents rely on AO 1996-1, in which the Commission was "unable to issue advice" as to whether members of an incorporated membership association who occupied significant positions in the campaigns of federal candidates "could receive contributions from other members of the organization and forward those checks to individual candidates."

Respondents argue that the facts in the instant matter provide an even weaker case for corporate facilitation, in that Kadow undertook all of his campaign activity on his own behalf, not as a part of an organized effort by Outback; and Kadow's activities were undertaken on behalf of a candidate for the district in which his home and business were located, "meaning that he had a distinctly personal connection to the Sharpe campaign."

C. Applicable Law

Pursuant to 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(b) and (d), it is illegal for any corporation to make a contribution in connection with any election for Federal office, and for any officer or director of a corporation to consent to any such contribution. The term "contribution" means "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate [or] campaign committee . . . in connection with" an election to Federal office. 2 U.S.C. § 441b(b)(2). Employees of a corporation may make "occasional, isolated or incidental use of the facilities of the corporation for individual volunteer activity in connection with a Federal election and will be required to reimburse the corporation only to the extent that the overhead or operating costs of the corporation are increased." 11 C.F.R. § 114.9(a)(1). "Occasional, isolated or incidental use"

means, when used by employees during working hours, "an amount of activity . . . which does not prevent the employee from completing the normal amount of work which that person usually carries out during such work period." 11 C.F.R. § 104.9(a)(1)(i). A corporation may suggest to its restricted class that they contribute to a particular candidate, without that action being considered a corporate contribution or expenditure, but may not facilitate the making of the contribution or act as a conduit for the contribution. *See* 11 C.F.R. § 114.3(a)(1); *see also* Advisory Opinion 1987-29. When a corporation facilitates the making of a contribution by a person to a political committee, that action is in itself a contribution by the corporation to that same political committee.

D. Analysis

Based on the evidence in hand, Joseph Kadow was acting on behalf of Outback in carrying out fundraising and other duties for the Sharpe campaign. This determination is based not only on Kadow's activities, but also on the activities of more senior Outback executives, as well as the candidate Mark Sharpe himself. As a result, Outback facilitated the making of contributions to the Sharpe campaign.

The facts of this matter are similar in certain respects to a particular fact pattern in MUR 3672 where the Commission found probable cause to believe that corporate facilitation had occurred. In that fact pattern, a corporate executive solicited, collected and forwarded campaign contributions from corporate personnel. Among the significant factors in this decision were:

- (1) the executive normally handled the political and charitable functions of the corporation;
- (2) the executive solicited exclusively inside the corporation; (3) the executive delegated certain tasks to his secretary; (4) the executive was doing fundraising that had been requested of the

corporation's CEO; and (5) the fundraising was described to the executive's fellow personnel as a corporate endeavor.

Here, though the facts are somewhat different, they demonstrate the same sort of corporate involvement and purpose as existed in the MUR 3672 fact pattern.

First, statements reported in the *Tampa Tribune* demonstrate Outback's corporate interest and involvement in the Sharpe campaign. Kadow appears to confirm Outback's interest in the race, and in supporting Sharpe in particular, stating: "We asked our friends for help. Nobody's denying that. . . . We thought this was a race Mark could win, and we thought [the incumbent] was someone who had not been a friend to our business or to business in general." Rick Fontaine, the treasurer of Mark Sharpe for Congress at the time in question, notes that Kadow, as Outback's corporate attorney, would travel to Outbacks across the country and then return with campaign checks. After Kadow would arrive at night at campaign headquarters with contribution checks, the two "would go outside and talk or go next door to the Marriott." Another campaign worker, a volunteer named Terry Spirio, also remembers Kadow "bringing in lot of checks," and "remembers Sharpe meeting often with Outback officials at their corporate office."

Second, Outback appears to have incurred fundraising costs on behalf of the Sharpe campaign through Joseph Kadow's travel described above. The Outback/Kadow response does not contest the assertion that Kadow often traveled to Outbacks around the country and returned with campaign checks. Thus, it appears that Kadow may have either used the Outback corporate jet for these trips, or had his air travel costs paid for by Outback.

In addition, Outback incurred costs of \$450 due to activity by Kadow and his secretary on behalf of the campaign at the office. The Sharpe campaign never reimbursed Outback for these costs. Kadow states that he reimbursed Outback himself in 1996, at least 14 months after the election. Kadow's apparent use of transportation paid for by Outback, and Outback's absorption of fundraising costs incurred by Kadow and his secretary, strongly suggest that Kadow was acting on behalf of Outback in fundraising for the Sharpe campaign.

Finally, it is apparent that Outback executives other than Kadow were instrumental in obtaining contributions for the Sharpe campaign, and that those who contributed understood this effort to be on behalf of Outback. The *Tampa Tribune* article quotes a number of contributors with Outback connections who explained the reasons for their contributions. One individual, Dearing Hockman, the spouse of an owner of an Outback franchise in Birmingham, Alabama, is quoted as saying: "We're Outbackers. We did this in support of [Outback's current Chief Executive Officer] Chris Sullivan." An Outback franchise owner in Virginia and Maryland, B.J. Stone, said that Sullivan and Robert Basham, "explained things to us. It's a very strong partnership. We trust one another. If I needed something from Chris and Bob, they're there for me. It's the heart and soul of the organization."

Given the statements by Dearing Hockman and B.J. Stone, it appears that Outback executives used their Outback connections in soliciting contributions. It further appears that Joseph Kadow conducted a much more extensive effort in seeking support for the Sharpe campaign on behalf of Outback. Indeed, although Joseph Kadow has suggested that many of the people he solicited were acquaintances, such "acquaintances" included Outback personnel and other persons whom Kadow apparently met as a result of his employment with Outback. It is

apparent that Joseph Kadow would not have solicited many of these persons had he not worked for Outback.

Based on the evidence, Outback conducted a concerted effort to engender financial support for the Sharpe campaign. This effort went beyond allowable activity - such as partisan communications to a restricted class - to the collecting and delivering of contributions. Moreover, Outback officer Joseph Kadow apparently approved of, and took part in, this activity by Outback.

Therefore, there is reason to believe Joseph Kadow violated 2 U.S.C. § 441b(a).